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NO. 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY GRANZA and VINCENT FERRARA,
Petitioners

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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The Clerk will enter our appearance as Counsel for the Petitioners.

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To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

ANTHONY GRANZA and VINCENT FERRARA, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, rendered against them on May 24, 1967, and styled "Anthony Granza and Vincent Ferrara v. The United States of America, No. 22064." (R. 1413-1423). Petitioners' Motion for Rehearing was overruled with written opinion July 27, 1967. (R. 1467-1468)

CITATIONS TO OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in the above styled cause are as yet unreported, but copies of said opinions are attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., § 1254(1). The opinions of the United States Court of Appeals for the Fifth Circuit in this cause are in conflict with the Constitution and Laws of the United States and the holdings of other United States Courts of Appeal interpreting said Constitution and Laws.

The Judgment in this cause became final on July 27, 1967, upon the entry of the Order overruling Petitioners' Motion for Rehearing. (United States Court of Appeals for the Fifth Circuit, Rule 32).

Petitioners' Motion to the United States Court of Appeals for the Fifth Circuit for an Order Staying Mandate therein, pending timely presentation of their Petition for Writ of Certiorari to this Honorable Court was granted to the limited extent that Mandate was stayed until August 19, 1967, and will be further stayed provided Petitioners file a Petition for Writ of Certiorari in this Honorable Court together with a certified record on or before August 19, 1967. (See Appendix C)

QUESTIONS PRESENTED

FIRST QUESTION

Did the District Court err in admitting into evidence against Petitioners, over proper objections, evidence obtained as a result of unlawful and unconstitutional searches

of the property of alleged co-conspirators where said evidence was obtained in violation of the mandates of the Fourth and Fifth Amendments to the Constitution of the United States?

SECOND QUESTION

Has there been a violation of Petitioners' rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States where the District Court admitted into evidence against Petitioners, over proper objections, evidence obtained from each of the Petitioners at and subsequent to the time of their respective arrests and before Petitioners had been arraigned or otherwise apprised of their constitutional rights?

THIRD QUESTION

Did the District Court err in admitting into evidence, over proper objections, evidence against both Petitioners regarding overt acts 33 through 44 of the indictment where it was plainly shown, through the testimony of Respondent's key witness, that if any conspiracy had existed between Petitioners and other alleged co-conspirators, such conspiracy had come to an end prior to the time alleged in overt acts 33 through 44, in violation of Petitioners' rights under the Fifth and Sixth Amendments to the Constitution of the United States?

FOURTH QUESTION

Did the District Court err in admitting into evidence, over proper objections, proof as to both Petitioners which was not alleged by Respondent in the indictment, which proof acted to bolster Respondent's case against Petitioners, in violation of Petitioners' rights under the Fifth

and Sixth Amendments to the Constitution of the United States?

FIFTH QUESTION

Did the District Court err in admitting into evidence over proper objections, evidence in support of the overt acts alleged in the indictment prior to proving the existence of the conspiracy as alleged in the indictment?

SIXTH QUESTION

Did the District Court err in not granting the severance requested by Petitioners prior to trial, or in the alternative, in admitting into evidence certain items as against one of the Petitioners and giving cursory instructions to the jury that said item would not be considered by the jury as against the other Petitioner?

SEVENTH QUESTION

Did the Court of Appeals err in not reversing this cause based upon the supplemental Record agreed upon by all parties, which Record became available subsequent to the conviction of Petitioners, in the trial of another alleged co-conspirator, Stassi, that Respondent's key witness Abramson had committed perjury in Petitioners' trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved herein are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The Statutory provisions involved herein are Rules 5(a), 29 and 41(e), Federal Rules of Criminal Procedure. Because of their length, the text of

all of the foregoing provisions are set forth in Appendix A.

STATEMENT OF THE NATURE OF THE CASE

I. Procedural History of the Case

On November 1, 1963, Jorge Eduardo Moreno Chauvet, Paul Mondoloni, Jose Manuel Froylan Diaz Marin also known as Willy Oliveira, Emma Hinojosa, Joseph Stassi, Sr., also known as Joe Rogers, Vincent Ferrara and Anthony Granza, were indicted in the United States District Court for the Southern District of Texas, charged with having violated Title 21, United States Code, Section 174. This indictment was entitled 63-C-29. 63-C-29 was the successor to the indictment in Cause Number 63-C-25 charging the same parties with substantially the same offense. Cause Number 63-C-25 was presided over by Judge Ingraham of the Houston Division of the Southern District of Texas. 63-C-29 was presided over by Judge Garza. All motions and rulings had in Cause Number 63-C-25 were considered as made in Cause Number 63-C-29 and the same rulings were carried along by Judge Garza. (R. 6) Cause Number 63-C-29 is a portion of Cause Number 63-H-212, originally returned in the Houston Division and transferred to the Corpus Christi Division as to Petitioners. (R. 28-29) Only Petitioners (Granza and Ferrara) of the seven (7) co-indictees were tried in the instant case. The indictment was dismissed as to co-indictees Froylan, Marin and Hinojosa. (R. 28-29) Co-indictee Stassi was a fugitive at the time of trial but was later tried.

The testimony of the Government consisted of evidence regarding the arrests of Milton Abramson and Adela

Gomez de Castillo, alleged co-conspirators but not defendants in Houston, Texas, on November 7, 1962, and the discovery, through various searches and seizures and upon the arrest of said alleged co-conspirators of twenty-two (22) pounds of alleged heroin. All other testimony was given either by the said Milton Abramson or by other individuals, most of whom were custodians of records of various transportation corporations or hotels supportive of the testimony of the said Milton Abramson, which testimony dealt with the overt acts alleged in the indictment.

When the Government had rested, both Petitioners moved, pursuant to Rule 29, Federal Rules of Criminal Procedure, for judgments of acquittal which motions were denied by the Court. Neither Petitioner introduced any evidence in his behalf and the jury found each Petitioner guilty. Petitioner Anthony Granza was sentenced on the 30th day of October, 1964, to twenty (20) years to be served in a United States Penal Institution in the custody of the Attorney General of the United States. The Petitioner Vincent Ferrara was sentenced on the 30th day of October, 1964, to serve eighteen (18) years in a United States Penal Institution in the custody of the Attorney General of the United States. Both Petitioners gave Notice of Appeal and elected not to commence service of sentence and requested bail, which requests were granted. (R. 1229-1253)

Both Petitioners perfected their Appeals to the United States Court of Appeals for the Fifth Circuit, which Court affirmed their convictions on May 24, 1967 (R. 1467-1468), and denied their Motion for Rehearing on July 27, 1967. (R. 1467-1468)

II. Facts Material to the Questions Presented

1. In admitting into evidence the twenty-two (22) pounds of alleged heroin as evidence against Petitioners, the District Court in effect ruled that federal officers may, on the following information, conduct a search, not incident to an arrest, and without judicial process, may subsequently arrest individuals, likewise without process and may use the evidence obtained from the first search and arrests to effect a second search.

(1) Tip from a known and supposedly reliable informer that at sometime a man will cross the Texas-Mexico border with a large amount of heroin and that the federal officers will be advised later by another individual with more details;

(2) Tip from an unknown individual, whose credibility was in no wise known to the federal officers that a woman would have, at the McAllen, Texas, bus station, a large amount of heroin, describing, to some extent, the woman;

(3) The eliciting of information from an attendant at the bus station as to the whereabouts of a suitcase brought there by a woman who met the description referred to in No. 2 above;

(4) The search of the suitcase referred to, without any judicial process and with the admitted ability to obtain judicial process at that time from a magistrate, either state or federal. (R. 190-234)

As a result of the search aforesaid, the federal officers made a test of the contents of the suitcase and made a determination, in their own minds, that the contents of

the suitcase was heroin and, based upon this knowledge followed alleged co-conspirator Castillo to Houston, Texas, arrested her and later arrested alleged co-conspirator Abramson and seized the suitcase referred to above, the contents of which were later introduced into evidence against Petitioners together with testimony that contents of the suitcase was heroin. This same evidence was the basis for the issuance of a search warrant which will be later discussed.

There was no testimony by the federal officers that the evidence in the suitcase was in danger of being destroyed or removed from the view of the officers before a warrant could be obtained (the officers admitted that a magistrate was available, R. 219), and the search was not conducted as an incident to a lawful arrest and further, the search was, in and of itself, not based upon probable cause.

The District Court also admitted into evidence the "contents" of a memo pad recovered by federal officers and/or officers working in concert with federal officers in the hotel room of alleged co-conspirator Abramson in Houston, Texas, which evidence was obtained as a result of an execution of a search warrant (R. 1362-1365) which was obtained as a result of an affidavit. (R. 1360-1361). This evidence was introduced and discussed at length during the trial and was a prime portion of the Government's case. (R.131-188, 378-384).

2. Government Exhibits 88, 89 and 90 were allegedly samples of the Petitioner Granza's handwriting. (R. 639-640). Each of these samples was taken from Granza after his arrest. (R. 643). Granza was advised that it was necessary for him to fill out each of the handwriting samples. (R. 64). (This is as to Exhibits 88 and 89).

Government Exhibit 90 in the form of a receipt for the return of Granza's automobile was signed by Granza in order to obtain the return of his automobile and it too was signed after he was arrested. (R. 644-645). Petitioner Granza was not taken before any judicial officer for arraignment or any other purpose until some seven and one-half (7½) hours after his arrest. He was not formally arraigned by the United States commissioner until he had been in custody for more than thirty-six (36) hours. The arresting Government agents did not advise Petitioner Granza of his right to counsel at the time of arrest but merely, in their own words allegedly advised him of his "Constitutional rights." (R. 667-668). The Government brought upon itself the problem of arresting Granza at an hour at which a commissioner was not readily available since they had notification of the outstanding warrant against Granza on June 13, 1963, two days prior to the arrest of Petitioner. (R. 672). Further, Government agents had Granza under surveillance on June 14, prior to his arrest on June 15. (R. 672-673). The only handwriting samples given to the Government's handwriting expert were those designated as Exhibits 88, 89 and 90. (R. 682). The District Court overruled the Motion to Suppress under Rule 41(e), Federal Rules of Criminal Procedure, as to the evidence obtained upon the arrest of Petitioner Granza, to-wit: Exhibits 88, 89 and 90. (R. 691). As the original testimony beginning on Page 632, was out of the jury's hearing, each objection was renewed in the presence of the jury. (R. 694).

With regard to the arrest of Petitioner Ferrara, Government Exhibits 91 and 92 are allegedly handwriting samples of Petitioner Ferrara. Each of these was taken subsequent to his arrest in the early morning hours of

June 15, 1963. (R. 709). It was admitted by Government agents that the samples were taken solely for the purpose of having handwriting samples. (R. 710). Exhibits 91 and 92 were admitted over objection. (R. 719).

Government Exhibits 88, 89 and 90, earlier associated with Granza, were again utilized by the Government. (R. 752). Each objection made by Granza's counsel was renewed. Government Exhibits 91 and 92 earlier associated with Ferrara, were once again utilized by the Government. (R. 763). Proper objections were again urged. The handwriting expert admitted that he utilized Government Exhibit 79 in his comparison, along with Government Exhibits 91 and 92, all referring to Ferrara. (R. 786). The District Court at R. 799 stated that for purposes of Petitioners' respective Motions to Suppress regarding the alleged handwriting samples, he was considering that the evidence was illegally obtained.

3. Overt Acts 33 through 44 refer to the alleged importation of twenty-two (22) pounds of heroin confiscated in Houston, Texas. The record shows conclusively that if in fact there was a conspiracy between Petitioners or either of them and any of the alleged co-conspirators in the indictment this conspiracy came to an end prior to the Overt Acts alleged as Overt Acts 33 through 44.

"Q. Did Joe Stassi go to Mexico City after this Chicago delivery and after the payment?
A. Well, we had our bank roll. That would have put our bank roll about where I wanted it. I wasn't too happy. I don't think even they wanted to go any further after that.
Q. And what happened? Did you have further contact with Joe Rogers?
A. Well, naturally I had contact with Rogers. We

had enough money to go into the mining proposition. We had enough money to open up a brokerage office. We had enough money to go into the produce business.

Q. And did you go to Mexico City to see about any of these things?

A. Yes, I checked out of the hotel late in September, late in October or early in November, and went to Mexico City and met the engineer and went down there to look at the property.

Q. And the engineer, who is he?

A. Murray Sokolof.

Q. Where did you meet him, incidentally; what place?

A. Previous, or the first time?

Q. Well, for this trip.

A. I met him at the San Antonio-Gunter Hotel in San Antonio." (R. 292-293)

* * *

"A. Well, we met George Moreno on a Saturday morning in Sanborns. I was under the impression that the money—Joe would have the money and cut up the money, but Joe was talking to Moreno and I was just sitting there. I got the impression right away that they were manipulating another deal, and I was kind of against it. I didn't want it, I said no. I says, "We got enough, Joe." I says, "Let's go ahead and do what we are supposed to do, the plan that we are supposed to carry out." We had quite a discussion about it. I says, "As a matter of fact, I don't think the people up in New York want any more of it," but I was swayed against my better judgment.

Q. Okay, and what happened?

A. He says, "You are going back to Houston. Why don't you take a load off there, and that will be the last one." Previous to that, I and the engineer went out to see a very important friend of mine

in Mexico City. Very highly, and Sokolof was extremely impressed with (325) the man." (R. 294)

The record also indicates that there was in fact no conspiracy involving Petitioners with Stassi and Abramson. (R. 323-330) The only thing proved, if anything, was that Petitioners purchased certain narcotics not that they were in any way involved in any conspiracy as alleged in the instant indictment.

"Q. Now let's see if I understand you clearly. The understanding was between you and Joe that he was to take care of the end of delivering the packages to you and you were to take care of the end of selling them, is that it?

A. I didn't say that. Joe was taking care of taking the (359) money down to—pardon me, Mr. Sidney. I meant—that's what I meant. Joe was in contact with the Mexican contact. He was bringing the money down, making the arrangements. If there were any arrangements to be made after that on delivering the package to the people, I would take care of—these people were in contact with me by telephone in the Buckingham Hotel.

Q. And you were to take care of the selling end of it and getting paid?

A. I was taking care of delivering the package to them and they were going to give me the money.

Q. Now tell us, was it your privilege under this arrangement with Joe that you were to be able to sell this to whomever you wished?

A. No.

Q. Providing you were paid your price?

A. It was never discussed. I didn't have anybody that I knew that could get rid of these packages so efficiently and produce the money like these

two boys had, and I thought he had very fine arrangements. I didn't know anybody that could handle the proposition, the facilities that they had to get rid of it.

Q. Well, so far as Rogers was concerned, it didn't make any difference to whom he sold it so long as he got (360) the price, is that correct?

A. Right." (R. 324)

The alleged co-conspirator Abramson further testified:

"Q. Now, I believe you testified that when you arrived in the city of Houston you found the defendant Ferrara registered at the hotel you were staying at; that's correct, isn't it?

A. Yes, sir.

Q. Was it you who invited him to come down?

A. Tony talked to me in the Jenova Hotel. He called me up in the Jenova Hotel Friday or Saturday night before I left, and I told him to have somebody at the Shamrock Hotel. I think it was Saturday night.

Q. That would be the first time that either of these two Defendants were made aware that you were now engaging in another illegal transaction; that's correct, isn't it?

A. Right." (R. 332).

At R. 813-828 Petitioners moved the District Court to strike certain enumerated evidence, which evidence the Government had continuously assured the District Court would be connected to the indictment and which would be shown to be proper evidence for consideration under the instant indictment to which the District Court continuously assured Petitioners' trial counsel that all evidence not properly before the jury would be stricken from consideration.

4. The District Court admitted into evidence, over objection, evidence designed at bolstering the veracity of the Government witness Abramson, the items testified to being strictly outside the scope of the indictment. (R. 237-243) The District Court admitted into evidence over objection, Government Exhibit 39 and testimony regarding the same. (R. 462-466) Exhibit 39 referred to a transaction an airplane ticket issued on November 20, 1962, for travel on November 20, 1962. Here reference is made to Overt Act 44 of the indictment in the instant case alleging that the last Overt Act occurred on November 7, 1962. Further, there is no question but that the conspiracy, if there was one, was broken as of November 7, 1962. The Government in its opening statement represented that the conspiracy terminated with the seizure in Houston of the alleged heroin on November 7, 1962, therefore limiting the indictment. (R. 52) No reference in the Bill of Particulars is made to any post November 7, 1962 activity.

5. From the earliest phases of the trial, counsel for Petitioners requested the District Court, and the District Court denied all such requests, to have the Government, prior to admitting evidence regarding Overt Acts, first establish a conspiracy as against Petitioners. (R. 61-63, 67). (See also, R. 134, 138, 140-142, 236-243).

In the instant cause, no effort was made on the part of the District Court to in any way channel the evidence elicited by the Government as to the burden of proof aforesaid, with the result that the Government did not sustain its burden of proving a *prima facie* case of guilt against Petitioners.

As admitted by the Government in its opening statement (R. 50-52) there were at least two separate con-

spiracies, one being a conspiracy by Abramson, Mondolini, Moreno and Stassi to transport heroin into the United States and a separate conspiracy regarding the actual transferal of heroin into the United States by individuals such as Castillo and Hinojosa.

6. This is a multiple defendant case. In light thereof counsel for Petitioner Granza filed, for Granza, a Motion for Severance which was overruled by the District Court. (R. 10-11).

All testimony regarding the activities of Adela Gomez DeCastillo subsequent to her arrest at the Texas State Hotel, in Houston, Texas, were inadmissible as against any other co-conspirators; the District Court did not so rule. The District Court in ruling stated:

> "MR. WOODY: Your Honor, I'm going to object to anything that Mrs. Castillo might have done after the arrest. Certainly this could not possibly, under any theory of the law concerning conspiracy, be in furtherance of any conspiracy. Even if the government had already proven the conspiracy, they could not prove the acts of any of the alleged conspirators not in furtherance of the conspiracy, but in frustration thereof. This is exactly what they are proving now, and I submit this is not proper proof in this case.
>
> MR. BUTLER: If the Court please, as to Mrs. Castillo, under the law the conspiracy was terminated by her arrest, but as to the other conspirators who were unaware of that arrest, the conspiracy was still in operation and functioning. The evidence is being offered now as to the activities of other conspirators carrying forward the conspiracy in attempting to carry it out.
>
> THE COURT: Well, limit it to that. Go ahead." (R. 71-72).

Subsequent to this ruling of the District Court, a great amount of evidence was admitted, over objection, as to the *activities* of Mrs. Castillo subsequent to her arrest, both individually and as her acts occurred together with those of alleged co-conspirator Abramson. (R. 72-74).

The same condition existed with regard to the acts testified to subsequent to the arrest of Abramson. (R. 74).

From R. 276 through 279 alleged co-conspirator Abramson testified regarding a "Newark delivery". At page 279 trial counsel for Petitioner Ferrara objected to that testimony and moved that it be stricken since it was outside the scope of the indictment, there being no reference to same in the indictment nor in the Bill of Particulars furnished to the Petitioners. This objection was joined into by Granza's trial counsel and the District Court granted the objection to the testimony and merely instructed the jury "that they are not to consider in any form whatsoever this testimony regarding this transaction at the Carolton Hotel in New Jersey." (R. 282).

With regard to the Government exhibits referred to in Question Two above the only protection given to respective Petitioners as to the introduction of said evidence as to the particular Petitioner involved was as follows:

> "THE COURT: All of this testimony with regard to the arrest of Granza and these samples here are not binding on Ferrara because they pertain only to the Defendant Anthony Granza. I am going to admit those just for the limited purpose as stated by counsel for the Government, that they are just handwriting samples of Anthony Granza, to be compared with other samples I guess." (R. 694).

A similar instruction was given with regard to the alleged handwriting samples of Petitioner Vincent Ferrara.

7. Subsequent to the affirmance of this cause in the United States Court of Appeals for the Fifth Circuit, it was made known to Petitioners' attorneys of record that in the case of the *United States of America v. Joseph Stassi, Sr.*, Criminal No. 63-C-29 pending in the United States District Court for the Southern District of Texas, Corpus Christi Division, the same being a case involving one of the other alleged co-conspirators and being in the same cause as is the instant case, that Appellee's "star" witness, Milton Abramson, alias Milton Bennett, had admitted to perjuring himself with regard to one of the alleged transactions of the Indictment as reflected by Overt Acts 7 through 10. The original testimony by Abramson is found at pages 17 through 31 of the transcript of his testimony before the Corpus Christi, Texas Grand Jury on March 19, 1963. This testimony is the same testimony as given by Abramson at Petitioners trial which testimony may be found beginning at R. 251 of the record herein. Likewise, Abramson's testimony was the same on direct examination in the *United States of America v. Stassi, supra,* as reflected by pages 61-67 of the typewritten record therein. Abramson admitted his perjury beginning at page 718 of the *Stassi* record. The pertinent portions of the record in the *United States of America v. Stassi, supra,* were included in the record of this cause by order of the United States Court of Appeals for the Fifth Circuit. (R. 1468) That record has not been heretofore certified to this Honorable Court by the Clerk of the United States Court of Appeals for the Fifth Circuit. It will be certified as a supplemental record.

III. Basis For Federal Jurisdiction in the Court of First Instance

The jurisdiction of the United States District Court for the Southern District of Texas, the Court of first instance, was invoked because the cause arose out of an indictment returned in said Court by the Federal Grand Jury charging Petitioners with having violated 21 U.S.C., § 174.

IV. Reasons For Granting Writ of Certiorari

I.

This Honorable Court should grant Petitioners' Petition for Writ for Certiorari herein since there is involved in this cause herein substantial questions regarding the application of the Fourth and Fifth Amendments to the Constitution of the United States as they involve persons accused in Federal conspiracy cases. The Court of Appeals in this cause has held that Petitioners have no standing to complain of the introduction of unconstitutionally obtained evidence against them even where Petitioners are alleged to be co-conspirators in a scheme to import the very heroin into the United States that the Court says they have no standing to complain about. Petitioners like so many others charged in conspiracy cases are in fact "victims" of unlawful searches and seizures which are initially directed against other alleged co-conspirators, but are in fact directed against and utilized against those like Petitioners. The opinion by the Court of Appeals below as well as the rulings by the District Court reflects a common law straight jacket of "ownership or possession" which does not provide those like Petitioners with the rights guaranteed to them under the Fourth and Fifth Amendments of the Constitution of the United States. The

opinions by this Honorable Court are not consistent with the opinion of the Court of Appeals below. Likewise, the affidavit obtaining the search warrants utilized, initially against an alleged co-conspirator but effectuately against Petitioners, has been held by this Honorable Court in such cases as *Aquilar v. Texas,* 378 U.S. 108, and *Jones v. United States,* 362 U.S. 257, to be insufficient to comply with the mandates of the Fourth and Fifth Amendments to the Constitution of the United States. See Boyd v. United States, 116 U.S. 616. Certiorari should be granted herein so that the Federal District Courts within the Fifth Circuit may be advised of the requirements of affidavits supporting search warrants for the efficient processing of criminal cases henceforth.

II.

Petitioners' Petition for Writ of Certiorari should be granted herein so that this Honorable Court can discuss the proper procedure for conducting a Federal criminal conspiracy trial. The instant cause presents, specifically the necessity for this Honorable Court to rule upon the present status of the law as regards the holding by this Honorable Court in *Paoli v. United States,* 352 U.S. 232 This Honorable Court in footnote 15 in *Jackson v. Denno,* 378 U.S. 368, cites the late Mr. Justice Frankfurter's dissent in *Paoli, supra,* with approval. The Court of Appeals below has apparently continued to accept the majority rulings in *Paoli, supra.* Likewise, this cause presents the occasion for this Honorable Court to determine the procedure to be followed in presenting evidence in a conspiracy case and the safeguard which must accompany any such trial in order to protect the accused's rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

III.

This Honorable Court should grant Petitioners' Petition for Writ of Certiorari herein so as to distinguish cases of the type of the instant cause from that presented in *Gilbert v. California*, ____ U.S. ____, 35 L.W. 4614. In the instant cause the handwriting exemplars were specifically obtained, after indictment and before arraignment, for the specific purpose or use against Petitioners at trial. The exemplars were in fact "communicative". For this Honorable Court to hold that Federal officers can obtain such information without Petitioners having been warned or in any way protected as regards to their constitutional rights, is to hold that Federal officers have the right to so prejudice an individuals cause that his trial is a mere formality. The Court is likewise making a distinction between what can be done by the Federal officer outside the courtroom and what can be done by the Federal prosecutor within the courtroom. There can be no constitutional distinction. See *Massiah v. United States*, 377 U.S. 201.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioners' Petition for Writ of Certiorari and reverse and remand said cause to the United States Court of Appeals for the Fifth Circuit for action consistent with the Opinion and Orders of this Honorable Court so that there will be no curtailment of Petitioners constitutionally guaranteed rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United

States, and Rules 5(a), 29 and 41(e) of the Federal Rules of Criminal Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Clyde W. Woody, attorney for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of August, A.D., 1967, I served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Solicitor General of the United States, Department of Justice, Washington 25 D.C., and upon the Honorable James R. Gough and William B. Butler, Assistant United States Attorneys, 515 Rusk Avenue, Houston, Texas, by depositing envelopes containing such copies in the United States Mail, with first class postage affixed thereto, air mail where applicable, return receipt requested and addressed as aforesaid.

CLYDE W. WOODY

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT (IV.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Proceedings before the Commissioner

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 41. Search and Seizure

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidenee anything so obtained on the ground that (1) the property was illegally seized without warrant; or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22064

ANTHONY GRANZA and VINCENT FERRARA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 24, 1967.)

Before HUTCHESON, WISDOM and COLEMAN, Circuit Judges.

HUTCHESON, Circuit Judge: Anthony Granza and Vincent Ferrara were tried and convicted by a jury in the district court of conspiracy to smuggle heroin and thereafter facilitate its transportation in violation of 21 U.S.C. Sec. 174.[1] Granza was sentenced to serve 20 years

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[1] For other cases dealing with this conspiracy, see Marin v. United States, 352 F.2d 174 (5th Cir. 1965); Randazzo v. United States, 339 F.2d 79 (5th Cir. 1964).

and Ferrara to serve 18 years. Both appeal, and we affirm their convictions.

Neither appellant produced any evidence in his behalf so the following is a summary of the government's evidence. The formation and operation of the conspiracy were described by Milton Abramson, one of the conspirators. Abramson testified that the conspiracy was initiated in a series of meetings held in Mexico City and New York City. His role in the conspiracy was to receive shipments of heroin from couriers at various places in the United States, pay for the heroin, and turn it over to another conspirator. He testified that appellants aided in the transfers of heroin, frequently furnishing the money which he used as payment.

A transfer of heroin which was to have taken place in Houston was frustrated by the arrest of Abramson and the courier, one Mrs. Castillo. She had crossed the Mexican border into Texas and proceeded to McAllen, Texas, where she received a suitcase later found to contain 22 pounds of nearly pure heroin. She went to the bus station, bought a ticket to Houston, and checked the suitcase at the baggage counter. While the suitcase was in the baggage room, it was searched (unknown to Mrs. Castillo) by customs agents who had placed her under surveillance pursuant to an informer's tip. After arriving by bus in Houston, she carried the suitcase to the Texas State Hotel where she was arrested. She agreed to cooperate with customs agents by completing the transfer of heroin. When Abramson later arrived at the hotel to receive the shipment, he also was arrested, and the suitcase was seized. Appellant Ferrara, who was in Houston to participate in the transfer of this shipment, stayed at the same hotel as Abramson.

Most of the other evidence corroborated this account. Since the defense offered no testimony, this statement of the facts remains unchallenged. Moreover, the sufficiency of the evidence to support the convictions is not attacked. However, numerous specifications of error are urged.

Admitted into evidence were the heroin and a memo pad, found in Abramson's hotel room, on which was written Ferrara's room number and the telephone number of the Texas State Hotel; appellants assert these items were obtained by unreasonable searches and seizures, and therefore were inadmissible. No search warrant was acquired in connection with the search of the suitcase at the McAllen bus station, and although officers uncovering the memo pad did have a search warrant, appellants maintain the warrant was defective. We do not inquire into the legality of these searches, because we hold that appellants do not have standing to complain.

Applying the general principle that a party cannot claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given," *Hatch v. Reardon,* 204 U.S. 152, 160 (1907), F.R. Crim.P. 41 permits only "a person aggrieved" by an unlawful search and seizure to move for the suppression of the evidence so obtained. The Supreme Court has stated, in broad terms, that this means "one must have been the *victim* of a search or seizure, . . . as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure *directed at* someone else." (emphasis added). *Jones v. United States,* 362 U.S. 257, 261 (1960). Fashioning the precise attributes necessary to qualify as an aggrieved person, however, has proved difficult.

This Court has had occasion to comment upon the effect of *Jones v. United States, supra.* In *Henzel v. United States,* 296 F.2d 650 (5th Cir. 1961), we noted

> "In Jones, the Supreme Court held that a person accused of possessing narcotics in violation of the Federal Narcotics Laws could attack the Government's allegedly unlawful seizure of the narcotics even though (a) his presence in the apartment where the narcotics were seized was merely that of a 'guest' or 'invitee,' and (b) he did not admit to 'ownership' of the narcotics. In so holding, the Court repudiated the rule which had been adopted by many Courts of Appeals that, in order to qualify as 'a person aggrieved by an unlawful search and seizure,' the accused must show ownership or possession of the seized property or a substantial possessory interest in the invaded premises." Id. at 651.

We then observed that although Jones indicates what is *not* necessary in order to qualify as an aggrieved person under Rule 41, it failed to formulate a general rule with respect to what *is* required; hence Jones did not provide us with a precise and unequivocal definition of an "aggrieved person." Therefore we considered it helpful to compare Henzel's interest in the property seized and premises searched with Jones' same interests. Jones had sufficient interest to complain of a search of an apartment because he was lawfully present in the apartment. Henzel had standing to complain of the seizure of a corporation's books and records because he was the sole stockholder of the corporation, and had prepared much of the seized material which had been kept in his office where he spent

the greater part of each working day; moreover, the search was "directed at" him. His interest was considered at least as deserving of protection as Jones'.

We think it clear that under the facts of the instant case, however, the appellants did not have the necessary interest in the items seized and premises searched to entitle them to complain of the government's conduct. Mrs. Castillo's suitcase was searched in the McAllen bus station. The appellants were nowhere in the vicinity; nor did they have any interest in the premises or the suitcase. The only conceivable interest they had in the heroin was the hope of deriving profit from it in the future through the conspiracy. This is not enough. In *Diaz-Rosendo v. United States,* 357 F.2d 124, 132 (9th Cir.), cert. denied, 385 U.S. 856 (1966), it was held that a defendant accused of conspiracy to smuggle narcotics could not complain of a purportedly illegal search of a co-conspirator's car which discovered narcotics, because the search was directed solely at the vehicle and person of the co-conspirator. See *Wong Sun v. United States,* 371 U.S. 471, 492 (1963); *Bullock v. United States,* 368 F.2d 483 (5th Cir. 1966). The search here was "directed at" the suitcase and person of Mrs. Castillo, and although that is not the exclusive test, see *Henzel v. United States, supra* at 652, it is entitled to weight. In light of these considerations, we conclude that appellants' right of privacy was not invaded, and therefore they cannot complain of admission into evidence of the heroin.

That appellants also cannot contest the search of Abramson's hotel room by which the memo pad was found is even more clear. The appellants had no interest at all in the premises, and neither were they present. See *United States v. Grosso,* 358 F.2d 154 (3d Cir.), cert.

granted, 385 U.S. 810 (1966); *D'Argento v. United States,* 353 F.2d 327 (9th Cir. 1965), cert. denied, 384 U.S. 963 (1966); *Armada v. United States,* 319 F.2d 793 (5th Cir. 1963).

Personal history forms filled out by appellants after arrest were offered at trial as samples of their handwriting. The forms are part of the routine processing of persons arrested by customs agents. They were used, however, by the government's handwriting expert to explain his opinion that other handwritten documents tending to connect appellants with the conspiracy were written by them. It is suggested that to put these samples in evidence was error on the ground that they were protected by the right against self-incrimination. Even if this contention has merit under *Schmerber v. California,* 384 U.S. 757 (1966), which we do not decide, reversal would not be required since this bit of evidence is cumulative of that in the extensive record which convincingly evinces the part played by appellants in the conspiracy.

It is further urged that the samples were inadmissible because they were obtained (a) without appellants having been brought before a commissioner without unnecessary delay in violation of F.R.Crim.P. 40(b);[2] and (b) before appellants were properly advised as to their right to coun-

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2 F.R.Crim.P. 40(b)(1) provides: "If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, . . . he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made." Appellants in fact rely on F.R.Crim.P. 5(a), but since they were arrested in New York on a bench warrant issued in Texas, Rule 40(b) is the applicable rule. However, this does not affect appellants' contention because both rules incorporate the "without unnecessary delay" language, and we find no difference between the two rules significant to this case.

sel. In addition to the cumulative nature of the samples, these two contentions are rejected on an independent ground for they are met and refuted by the record. The appellants were arrested separately at 2:30 a.m. and 6:30 a.m. on a Saturday morning. Because the arresting officers doubted whether a commissioner could be reached that morning, appellants were taken before a federal district judge at 10 a.m. the same morning. No contention is made that any coercive means, physical or psychological, were employed during the delay. No reason, other than unavailability of a committing magistrate, is suggested for the delay. Under these circumstances we hold that the delay did not violate Rule 40(b). See *Rogers v. United States,* 330 F.2d 535, 538 (5th Cir.), cert. denied, 379 U.S. 916 (1964); *United States v. Walker,* 176 F.2d 564, 567 (2d Cir.), 338 U.S. 891 (1949). The record also clearly reveals that appellants were advised, and were aware of, their right to counsel under the principles of *Escobedo v. Illinois,* 378 U.S. 478 (1964), which applies to the case at bar.

The appellants next contend that any conspiracy in which they were involved had terminated prior to the shipment of heroin carried to Houston by Mrs. Castillo. They cite testimony of co-conspirator Abramson which indicates that he felt he possessed enough money to enter another business and therefore was reluctant to continue in the smuggling operation. However, he also said that he was swayed against his "better judgment", and in fact he did continue in the conspiracy. Any suggestion that this testimony demonstrates a termination of the conspiracy is without merit.

It is also asserted that the admission into evidence of an airplane ticket showing that one J. Stassi, inferentially

co-conspirator Joseph Stassi, Sr., flew from New York to Mexico City on November 20, 1962, was error on the ground that this evidence was without the scope of the indictment. The assertion is groundless since the dates during which the indictment alleged the conspiracy existed encompass the date of the plane flight.

Appellants next insist it was error to allow a customs agent to describe the activities of Mrs. Castillo subsequent to her arrest since such activities were not in furtherance of the conspiracy. It is true that out-of-court declarations, made when the declarant is no longer a conspirator and offered to prove the truth of their contents, are not admissible against one of the declarant's partners in crime. *Wong Sun v. United States, supra* at 490. However, that rule does not apply here. This was testimony of a government agent, not a former conspirator, describing the actions, not the declarations, of Mrs. Castillo after her arrest. See *United States v. Costello*, 352 F.2d 848, 853-54 (2d Cir. 1965), cert. granted, limited to question of constitutionality of tax wagering laws, 383 U.S. 942 (1966).

The jury instructions of which appellants complain were that some evidence was binding only on Granza while other evidence was binding only on Ferrara. The instructions were clear. There were only two defendants in the case. The jury should have had no difficulty in understanding and applying the instructions which we therefore find were without error.

Other contentions pressed on us by appellants also are unavailing.

We conclude that none of the specifications of error urged by appellants are meritorious. Accordingly, the judgments are AFFIRMED.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22064

ANTHONY GRANZA and VINCENT FERRARA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of ten (10) days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within ten (10) days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of ten (10) days from the

date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 9th day of August, 1967.

/s/ J. C. HUTCHESON, JR.
United States Circuit Judge

(ORIGINAL FILED - AUGUST 10, 1967)